"Revitalizing International Law to Meet the Challenge of Terrorism"

April 22, 2004
The Pontifical Gregorian University

As he did in his World Day of Peace message, Pope John Paul II has again called for reform of international legal structures that would make international law a more effective weapon against terrorism. This conference, sponsored by the U.S. Embassy to the Holy See, sought to respond to the Pope's call to "develop multilateral legal instruments capable of monitoring, counteracting, and preventing this heinous crime." The goal of the conference was to identify inadequacies of current international structures and examine potential improvements.

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Prof. Giovanni Barberini, Professor of Law at the Libera Universitá Internazionale degli Studi Sociali (LUISS) and consultant to the Italian Ministry of Foreign Affairs on human rights and international law. Formerly Professor at the University of Perugia and the Lateran University. He serves as first President of the Council of the International Agency for Diplomacy and Public Opinion. He has written widely on international law and the Holy See, including a 2003 book *Le Saint-Siege: Sujet Souverain de Droit International*.

Mr. Philippe Meunier, Deputy Director for Security Affairs in the French Foreign Ministry's Department of Strategic Affairs, Security and Disarmament. In this role he is the French Representative to the G-8 Counter-terrorism Action Group (CTAG) which was established at the 2003 G-8 summit meeting in Evian. Prior to assuming his current responsibilities, Mr. Meunier was the Chief of Staff and Deputy Chief of Staff for the French Mission to the Organization de la Francophonie. A career diplomat, he has served in missions to the European Union and Nairobi.

Dr. Joseph McMillan, Academic Chairman of the Near East-South Asia Center for Strategic Studies at the National Defense University. He previously served as a distinguished research fellow in the Institute for National Strategic Studies at the National Defense University. Dr. McMillan formerly served in the U.S. Office of the Under Secretary of Defense for Policy as a Country Director and Principal Director and has covered, *inter alia*, the Near East, South Asia, and the former Soviet Union. He is the author of *U.S.-Saudi Relations: Rebuilding the Strategic Consensus* (2001).

Mr. David Rivkin, Scholar and commentator on international law and terrorism, Partner in the Washington, D.C. law firm of Baker & Hostetler, L.L.P. Mr. Rivkin served in a variety of legal and policy positions in the Reagan and Bush administrations, including the office of the White House Counsel and the Department of Justice.

Father Thomas Williams, Dean of Theology and Professor of Moral Theology and Catholic Social Thought at Rome's *Regina Apostolorum* Pontifical University. He has served as Vatican spokesperson for the English-language media for both the Synod for Bishops and for the Synod for America. Fr. Williams is the author of several books and numerous articles on Catholic social teaching, human rights, international affairs and other issues. His latest book is *Who Is My Neighbor? Personalism and the Foundations of Human Rights* (2004).

U.S. Embassy to the Holy See 20th Anniversary Conference Revitalizing International Law to Meet the Challenge of Terrorism

"Building an International Consensus to Defeat Terror"

Opening Remarks as prepared for delivery by Ambassador Jim Nicholson

April 22, 2004

I am pleased to welcome you here today for what I believe will be a fruitful morning of dialogue on an issue that affects every member of the international community: the threat to civilized societies posed by terrorism. I am very thankful to Father Imoda and his entire staff here at the Gregorian University for hosting our meeting today and for their efforts to offer us such a beautiful and appropriate venue.

Our specific focus for this conference – the first of a series we are planning to mark the 20th anniversary of formal diplomatic relations between the United States and the Holy See – is to seek together a clearer understanding of how international law can be revitalized to better confront the threat of international terrorism. Our hope is that this gathering can contribute to international understanding of how best to deal with what is a fundamentally new challenge to our freedoms, our security, and our shared human dignity.

In speaking about the United States' relationship with the Holy See this anniversary year, I have frequently characterized our bilateral dialogue as a 'Partnership for Human Dignity.' It is well known that Pope John Paul II has placed the advance of human dignity at the very heart of his pontificate. It is less well known that 'championing human dignity' is the first goal of the current United States National Security Strategy. There are many ways in which we are working together to achieve this shared end, including our efforts to combat human trafficking, HIV/AIDS, hunger, and human rights abuses. But our shared desire to overcome the scourge of terrorism – which seeks to undermine the freedom and confidence at the heart of our societies – will be vital to our ability to meet all of these other challenges. That is why we wanted to begin this series of conferences by focusing on this new and expanding threat to human dignity.

Events of the past two years have made all too clear that no country is immune from the terrorist plague. Terrorist attacks on the United States, Indonesia, Pakistan, Saudi Arabia, Morocco, Israel, Turkey, Iraq and Spain have left little doubt of their determination to spread chaos and division through senseless acts of bloody violence. The death of the Italian hostage last week provided only one more brutal image of the depravity and lack of human compassion that characterizes this new wave of terror.

On Easter Sunday in his Urbi et Orbi address, Pope John Paul II called on world leaders and all people of good will to "find the strength to face the inhuman, and unfortunately growing, phenomenon of terrorism, which rejects life and brings anguish and uncertainty to the daily lives of so many hardworking and peaceful people." The Pope also expressed his hope that national and international institutions can overcome today's difficulties and achieve a more effective and peaceful world order. This is a hope shared by President Bush, who outlined the challenge before the United Nations as a battle between "those who honor the rights of man, and those who deliberately take the lives of men, women and children without mercy or shame." Our conference today is part of the response to the Pope's and the President's challenge to nations and international institutions to develop effective and united efforts against terror and to bring peace and stability to our world.

At the core of the United States' response to terrorism in the aftermath of the September 11 attacks has been a recognition that the threat posed by terrorists today is fundamentally new and different from any threat the world has faced before. While terrorism itself is not new, its new post-September 11 face is something we have never seen before. Today's terrorist acts are not, as in the past, intended to advance a specific political aim. Rather, they appear driven by a desire for destruction and death as ends in themselves, perhaps with a futile vision of destroying our unity, undermining our confidence, and eroding our freedoms. That is why we need new ways to deal with this threat.

President Bush's recognition that today's threats are unlike anything the world has faced before has led him to conclude that the United States and the international community need to think in new ways about how we ensure the safety and security of our peoples. He has concluded that we will not defeat terror by relying on military might alone. Instead, we must fight terrorist networks and those who support them using every means at our disposal – diplomatic, economic, law enforcement, information-sharing, intelligence, and military. The United States also believes that we must build a firm international consensus against terror. Only if the international community is united and working together will we be able to defeat this threat to our way of life.

To help build such a consensus, we decided last year to hold a conference in the framework of our 20th anniversary that would examine the challenges posed by terrorism to the accepted ways of the international community. Specifically, we wanted to look at how international law could be revitalized to better confront the threat of international terrorism.

Our intention was reinforced earlier this year when we heard the Pope's World Day of Peace Message, in which he recognized the need for a "profound renewal of the international legal order" similar to that which occurred after World War II. The Pope observed that "today, international law is hard pressed to provide solutions to situations of conflict arising from the changed landscape of the contemporary world." Specifically, he noted that a legal system designed to regulate law between states was not well-equipped to deal with non-state actors such as terrorist groups.

Our conference today seeks to respond to the Pope's call for a renewal of the international legal order by beginning a dialogue that examines the issues the Pope raised and with which we in the United States have been grappling intensively since September 11th. We are fortunate, and in this company I would even say blessed, to have with us today five distinguished experts with backgrounds in terrorism, international law, and the Holy See's approach to both, who will share with us their perspectives on how

revitalized international legal mechanisms can be powerful and effective instruments in the necessary fight against terror.

Father Thomas Williams, Dean of Theology Faculty at Rome's "Queen of the Apostles" Pontifical Athenaeum, will kick off our discussion by considering the moral and ethical foundations of the fight against terror within the framework of the Catholic Church's magisterium.

Joseph McMillan, a Senior Research Fellow at the U.S. National Defense University, will then examine the rights and responsibilities of sovereign states in this new era of apocalyptic terrorism.

Having framed the issues both from the perspective of the Holy See and modern nation states, we will then hear from a distinguished panel, which will discuss what is being done, what can be done, and what should be done to defeat this scourge.

- **Philippe Meunier** of the French Ministry of Foreign Affairs has served as Coordinator for G-8's comprehensive counterterrorism initiative agreed at the Evian Summit last year. He will discuss what the G-8 countries are doing today and what new directions they are taking to expand international cooperation against terror.

- **David Rivkin,** scholar and commentator on international law and terrorism, a partner in the Washington, D.C. law firm of Baker & Hostetler, L.L.P, and former official in the White House and Department of Justice will explore what he believes to be the considerable flexibility and unused potential in existing international conventions, and argue that the international community could make better use of existing law.

- Finally, **Prof. Giovanni Barberini** consultant to the Italian Ministry of Foreign Affairs on human rights and international law and professor at the Libera Universitá Internazionale degli Studi Sociali (LUISS) will round out our discussions with his reflections on terrorism, Catholic doctrine, and how the international community should respond to build a new legal system better adapted to our age and its challenges.

I look forward to these presentations and to a lively exchange with all present today. Our success today depends in large measure on your willingness to engage on these questions and take advantage of the expertise we have assembled.

Before turning the floor over to our first speaker, I would like to say that the United States recognizes that defeating terrorism as a threat to our way of life will not occur as a single, defining moment. It will not be marked by the likes of the surrender ceremony that ended the Second World War or the fall of the Berlin Wall. Only through the sustained effort to provide innovative solutions – including internationally agreed legal mechanisms – can we overcome the threat posed by terrorist organizations. Working together we can secure a world in which all people can live free from fear and where the threat of terrorist attacks does not define our daily lives.

I will conclude where I began. In striving to build an international consensus to defeat terror, we have to build a world rooted in human dignity where more and more countries and peoples live lives where values such as human dignity, the rule of law, respect for individual liberties, open and free economies, and religious tolerance predominate. In the end, these values will be the best antidote to terrorism. This is the world we are helping and hoping to build by our discussion today.

Terrorism and International Law: A Catholic Perspective

Father Thomas Williams

Dean of the Faculty of Theology
Pontifical College Regina Apostolorum

This morning's conference will explore some of the repercussions of a changing socio-political landscape on our traditional understanding of law, national sovereignty, war, and the common good, especially as they relate to the growing threat and reality of terrorism. The purpose of my lecture will be to tee up our discussion by laying out some chief lines of the Catholic Church's social teaching on these issues over the past 100 years, and to indicate what I believe to be the neuralgic questions of Catholic social doctrine that merit further study and elaboration.

Why International Law?

My first question, the one that gives rise to the others, is: Why does the Catholic Church advocate international law? Why isn't national law sufficient? How is this international law to be understood and what are its limits and limitations?

THE PURPOSE OF LAW: THE COMMON GOOD

Following the doctrine of Saint Thomas Aquinas[1] and the classical tradition he draws from, Catholic political philosophy teaches that the purpose of all law, and of the public authority that promulgates and enforces it, is the common good.[2] Above and beyond the particular good and particular interests of individuals exists the common good of the community. This common good is not the good of the abstract collectivity or the state, nor is it merely the sum total of the particular goods of the individual members, but rather the good of every person, both as an individual and as a social being in relation to the others.

Catholic social teaching defines the common good as "the sum total of social conditions which allow people, either as groups or as individuals, to reach their fulfillment more fully and more easily."[3] It is the specific mission of the law and public authority to guarantee these social conditions for the good of all.

This ensemble of conditions comprised by the common good can be broken down into three component categories:

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1 Aquinas states that "the end of law is the common good" (*Summa Theologiæ* (hereafter S. Th.) I-II, 96, 1, resp.). Later he adds: "And as the care of the common weal is committed to those who are in authority, it is their business to watch over the common weal of the city, kingdom or province subject to them" (ibid. II-II, 40, 1, resp.). Elsewhere he writes that "in every community, he who governs the community, cares, first of all, for the common good" (ibid. I-II, 21, 4).

2 The role of public authority is "to ensure as far as possible the common good of the society" (*Catechism of the Catholic Church* (hereafter CCC) 1898).

3 CCC 1906; Second Vatican Council Pastoral Constitution on the Church in the Modern World *Gaudium et Spes* (hereafter GS) 26, § 1; cf. GS 74 § 1.

(1) respect for the dignity of the person as such and the protection and satisfaction of his rights;
(2) social well-being and development of the group itself (material prosperity, health, education, culture, etc.);
(3) peace: the stability and security of a just order (cf. CCC 1907-1909).

THE UNIVERSAL COMMON GOOD

The common good does not exist only on the level of the state or nation, but at the level of every human group or community.[4] Thus we can speak of the common good of families, local communities, states and nations and of any other human groups that fall somewhere between. Moreover, along with the *particular* common good of these different human groups, we can also speak of the *universal* common good of the entire human family.

How can this universal common good be provided for? What is to keep the particular interests of the stronger members of human society, whether they be individuals, states or other social or economic institutions, from triumphing over the interests of weaker members?

The Catholic Church proposes two solutions to this problem, one at the level of *virtue* and the other at the level of *structures*.

1. Solidarity

The first "virtuous" solution goes by the name of *solidarity*.

In his 1987 encyclical *Sollicitudo Rei Socialis*, Pope John Paul II wrote that the growing economic, cultural, political and religious interdependence characteristic of the contemporary world constituted a moral category, to which corresponds the moral virtue of solidarity. Solidarity he wrote,

> "is not a feeling of vague compassion or shallow distress at the misfortunes of so many people, both near and far. On the contrary, it is a firm and persevering determination to commit oneself to the common good; that is to say to the good of all and of each individual, because we are all really responsible for all."[5]

Solidarity, therefore, as a virtue, impels the human person and communities to expand their horizons of moral concern, looking beyond individual interests to include the needs of other individuals and groups and to act with their interests in mind.

Though this virtue must be cultivated by all persons, it is especially important for those in public authority and for those whose actions most directly affect the situation of others.[6] Though public authority is responsible first to its own citizenry, that is, the portion of humanity under its tutelage, this priority is not exclusive, and public authority must widen the scope of its interest and concern to the whole of humanity.

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4 "Each human community possesses a common good which permits it to be recognized as such" (CCC 1910).

5 Pope John Paul II, encyclical letter *Sollicitudo Rei Socialis* (hereafter SRS) 38. Despite the novelty of the term, John Paul's definition sounds remarkably similar to a much older virtue which Thomas Aquinas called "legal justice." Aquinas, again following Aristotle, wrote that legal (or general) justice is that virtue "which directs human actions to the common good." (See S. Th., I-II, 60, 3 obj. 3 and ad 3).

The Catechism does not mince words when it declares: "International solidarity is a requirement of the moral order."[7]

Where the virtue of solidarity is assimilated and practiced, tensions between nations and peoples are reduced and the universal common good is promoted.[8]

2. International Law

The second "structural" solution proposed by the Church to insure the universal common good is an international rule of law.

Every human community needs an authority and a rule of law "*supra partes*" to govern it and disinterestedly provide for the common good.[9] Whereas there is a political authority[10] that watches over the particular common good of individual nations, there is no such authority to provide for the universal common good of the world community.[11] Moreover, no one nation can arrogate to itself this responsibility.

In his 1963 encyclical *Pacem in Terris*, Pope John XXIII wrote:

> Today the universal common good poses problems of worldwide dimensions, which cannot be adequately tackled or solved except by the efforts of public authority endowed with a wideness of powers, structure and means of the same proportions: that is, of public authority which is in a position to operate in an effective manner on a world-wide basis. The moral order itself, therefore, demands that such a form of public authority be established.[12]

This international cooperation, public authority or rule of law can take a variety of practical forms, and the Church's Magisterium refrains from specifying what sort of structures need to be instituted. The path to greater legal cooperation among nations will necessarily involve overcoming substantial hurdles, such as the perception that international bodies are equally, if not more, susceptible to lobbying and particular interests than their national counterparts. It is not uncommon to hear from people that they trust their own government more than any international body.

Furthermore, on the international level as well, the Church reaffirms the vital principle of subsidiarity, which determines that "a community of a higher order should not interfere in the internal life of a community of a lower order, depriving the latter

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6 Regarding the moral duty of solidarity in the economic sphere, Pope John Paul wrote: "Therefore political leaders, and citizens of rich countries considered as individuals, especially if they are Christians, have the moral obligation, according to the degree of each one's responsibility, to take into consideration, in personal decisions and decisions of government, this relationship of universality, this interdependence which exists between their conduct and the poverty and underdevelopment of so many millions of people" (SRS 9).

7 CCC 1941

8 "Solidarity... presupposes the effort for a more just social order where tensions are better able to be reduced and conflicts more readily settled by negotiation" (CCC 1940).

9 "Human society can be neither well-ordered nor prosperous unless it has some people invested with legitimate authority to preserve its institutions and to devote themselves as far as is necessary to work and care for the good of all." (John XXIII, encyclical letter *Pacem in Terris* (hereafter PT) 46) See also Leo XIII, encyclical letters *Immortale Dei* and *Diuturnum illud* as well as CCC 1898.

10 "By 'authority' one means the quality by virtue of which persons or institutions make laws and give orders to men and expect obedience from them" (CCC 1897).

11 "Therefore, under the present circumstances of human society both the structure and form of governments as well as the power which public authority wields in all the nations of the world, must be considered inadequate to promote the universal common good" (PT 135).

12 PT 137.

of its functions, but rather should support it in case of need and help to co-ordinate its activity with the activities of the rest of society, always with a view to the common good."[13] Therefore, any international law or authority should not be all-encompassing or invasive regarding the internal life of nations, but should be strictly limited to areas of life that cannot practically and effectively be governed by the nations themselves. The sovereignty of nations should not be compromised by overly aggressive international legal structures.

SPECIFIC AREAS OF INTERNATIONAL LAW

In the past century the need for international law or a supra-national public authority has been invoked by the Church's Magisterium principally (though not exclusively) in the context of two practical aims: (1) the arbitration and peaceful solution of international conflicts, (2) a coordinated effort to assure economic development throughout the world. Both of these aims are component parts of the universal common good.

1. Arbitration of international conflicts

The first area of concern arises from humanity's long history of armed conflict, and the especially bitter experience of the past century's bloodshed. Though recourse to war as a means of resolving international disagreements or repairing injustices is never ruled out as a matter of principle, the Church considers such recourse to be a last resort. She exhorts the peoples of the world to seek long-term solutions to conflict resolution that will obviate the need for war. In his 1991 encyclical Centesimus Annus, commemorating the hundredth anniversary of *Rerum Novarum*, Pope John Paul II wrote:

> Just as the time has finally come when in individual States a system of private vendetta and reprisal has given way to the rule of law, so too a similar step forward is now urgently needed in the international community. (CA 52)

Since the universal common good includes the security and stability of a just international social order, creative steps must be taken to facilitate cooperation among nations and the creation of structures to insure long-term peace. In this regard, John Paul has written:

> What is needed are concrete steps to create or consolidate international structures capable of intervening through appropriate arbitration in the conflicts which arise between nations, so that each nation can uphold its own rights and reach a just agreement and peaceful settlement vis-à-vis the rights of others. (CA 27)

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13 Pope John Paul II, encyclical letter *Centesimus Annus* (hereafter CA) 48 § 4; cf. Pius XI, encyclical letter *Quadragesimo Anno* I, 184-186. See also CCC 1885.

14 CA 58.

15 CA 52.

2. Development / Economic solidarity

A second practical area where the Church has repeatedly advocated international legal structures is the sphere of economic development. Whereas in the developed world legal structures exist which protect the rights of workers and demand accountability from economic enterprises, such structures are often lacking in less developed nations, which makes the latter enticing targets for exploitation by unscrupulous business interests. International trade itself also requires legal structures and authorities capable of redressing injustices. Furthermore, some nations are effectively excluded from development because they do not offer interesting market opportunities and are thus passed over for investment and trade. Pope John Paul II summarizes these concerns in his encyclical *Centesimus Annus*:

> Today we are facing the so called 'globalization' of the economy, a phenomenon which is not to be dismissed, since it can create unusual opportunities for greater prosperity. There is a growing feeling, however, that this increasing internationalization of the economy ought to be accompanied by effective international agencies which will oversee and direct the economy to the common good, something that an individual State, even if it were the most powerful on earth, would not be in a position to do. In order to achieve this result, it is necessary that there be increased coordination among the more powerful countries, and that in international agencies the interests of the whole human family be equally represented.[14]

In the same encyclical, John Paul compares the regulatory role of national business law to that of laws needed to orient international markets.

> Just as there is a collective responsibility for avoiding war, so too there is a collective responsibility for promoting development. Just as within individual societies it is possible and right to organize a solid economy which will direct the functioning of the market to the common good, so too there is a similar need for adequate interventions on the international level.[15]

With these more general principles of Catholic social teaching in mind, we can now turn our attention to the specific question that concerns us today regarding the role of international law for resolving international conflicts and especially the problem of international terrorism. To accomplish this we need to examine a few specific characteristics of the contemporary world situation.

The "new things" of today

Though acute interest in questions of social justice have accompanied the mission of the Church since its very origins, the corpus of Catholic social teaching as understood today formally began with the promulgation of Pope Leo XIII's encyclical *Rerum Novarum* in 1891. The evocative title "Of New Things" has been repeatedly cited by popes since Leo as a call to continually reread Catholic social teaching in the light of current social, political and economic realities. In the spirit of this healthy tradition, what are some of the new things of today as relating to the question of international law and peace?

The fundamental magisterial document dealing with these issues is the Vatican II Pastoral Constitution on the Church in the Modern World, *Gaudium et Spes*. This text treats the role of the Church in the world, meaning, principally, the role of the Catholic laity in the evangelization of the temporal order so that the diverse components of society will conform more and more to the requirements of the common good. The document was promulgated on December 7, 1965 by Pope Paul VI at the height of the cold war, twenty years after the end of the Second World War, fifteen years after the outbreak of the Korean War, nine years after Soviet Premier Nikita Kruschev's UN outbreak in which he pounded his shoe upon the podium and shouted to U.S. Representatives "We will bury you!" and just four years after the Cuban Missile Crisis.

At this time fears revolved around an all-out nuclear conflagration between the major superpowers, and it seemed to many that the only thing preventing war was the assurance of mutual destruction in which no one side could win. If we read this document carefully, we see that many of the Church's statements then and afterward rested on these fears.

> The horror and perversity of war is immensely magnified by the addition of scientific weapons. For acts of war involving these weapons can inflict massive and indiscriminate destruction, thus going far beyond the bounds of legitimate defense. Indeed, if the kind of instruments which can now be found in the armories of the great nations were to be employed to their fullest, an almost total and altogether reciprocal slaughter of each side by the other would follow, not to mention the widespread deviation that would take place in the world and the deadly after effects that would be spawned by the use of weapons of this kind.[16]

> The unique hazard of modern warfare consists in this: it provides those who possess modem scientific weapons with a kind of occasion for perpetrating just such abominations (ibid).

> All these considerations compel us to undertake an evaluation of war with an entirely new attitude.[1] The men of our time must realize that they will have to give a somber reckoning of their deeds of war for the course of the future will depend greatly on the decisions they make today. (ibid.)

These considerations followed closely on the 1963 encyclical letter of Pope John XXIII, *Pacem in Terris*, where he wrote: "Therefore in this age of ours which prides itself on its atomic power, it is irrational to believe that war is still an apt means of vindicating violated rights."[17]

Catholic moral theology has traditionally distinguished between the morality of going to war (*ius ad bellum*) and moral conduct during the war itself (*ius in bello*). Yet it was reasonable to ask whether going to war could ever again be morally justified when moral conduct during the war was rendered impossible by the very arms being used. Moral criteria employed for evaluating conduct during war include the principle of discrimination, whereby sufficient distinction must be made between combatants

16 GS 80.
17 *Acta Apostolica Sedis* 55 (1963), p. 291.

and civilians, and the principle of proportionality, whereby the force used must be proportionate to the ends sought. With the advent of extremely powerful nuclear weapons, these last two criteria seemed to many impossible to satisfy.

Though such statements as those we read a moment ago undoubtedly reflected the feeling and fears of the times, the far-reaching effects of modern weaponry continue to provoke serious concern. As recently as 1991, just two years after the fall of the Berlin Wall, Pope John Paul II wrote:

> It is not hard to see that the terrifying power of the means of destruction – to which even medium and small sized countries have access – and the ever closer links between the peoples of the whole world make it very difficult or practically impossible to limit the consequences of a conflict. (CA 51)

Yet in contemporary reflections on just war theory the ongoing development of ever more precise weaponry must be added to the equation. Recent experience has shown that such advances have made possible more limited warfare and discriminate strikes on strategic military targets with fewer civilian casualties and less destruction of property. Such military development can in no way lessen our unflagging commitment to peace, but should nonetheless be included in objectively evaluating specific military action.

Along with technological advances aimed at limiting war's consequences, a second "new thing" of today concerns us especially in our present discussion: the increasing use and scope of terrorist attacks. The terrorist attacks of September 11, 2001 on the United States and the recent Madrid bombings provide just two examples of the real threat that international terrorism imposes on modern civilization. The fears and insecurity that have arisen in the civilian population as a result of these atrocities, without mentioning the consequences on travelers and heightened racial strife, are simply beyond calculation.

The specific characteristics of terrorism vis-á-vis traditional state-on-state warfare to be addressed by my colleagues call for new applications of traditional elements of Catholic social thought. It is clear that in the face of this threat international cooperation becomes more, rather than less, important, while a nation's right to legitimate self-defense must be consistently upheld. To these specific considerations we now turn.

Sovereign Rights and Sovereign Responsibilities: Self Defense in an Age of Apocalyptic Terrorism

Joseph McMillan[1]

Senior Research Fellow
Institute for National Strategic Studies

Fighting Terrorism and the International Legal Context

The terrorist threat the world faces in the new century is decidedly different from that it faced in the last. The radical Islamist terrorists who presently constitute the gravest danger operate from profoundly different motivations than the terrorists who afflicted Italy and other Western European countries some 20 or 30 years ago. Terrorism inspired by extreme religious doctrines, as the eminent scholar of terrorism, Bruce Hoffman, wrote several years before the attacks of September 11, 2001, "assumes a transcendental dimension, and its perpetrators are consequently unconstrained by the political, moral or practical constraints that may affect other terrorists." This is not confined to Islamic terrorists; Hoffman specifically mentioned the Japanese group Aum Shinrikyo, and he could also have described the Sikh terrorists of the Indian Punjab in the 1980s in the same terms. However, as we have learned in the past several years, his characterization of religiously oriented terrorists as unconstrained by the standards that have limited the acts of previous generations of secular terrorists is particularly true of apocalyptic groups like Al Qaida and its ideological allies. No longer can we assume, as was said some years ago, that terrorists want "a few people dead and a lot of people watching." Moreover, the fruits of globalization have enabled terrorists to achieve a lot of people dead and to do so almost anywhere in the world.

Facing a different threat obviously implies developing a different strategy than those adopted to deal with the threats of the 1970s and 80s.

- In the past, one approach has been to harden high-value targets, increasing the risks of an attack so that terrorists would be deterred from attempting to strike them. How can we expect that to work when dealing with people for whom the loss of their own lives is an integral element of the attack? As the Egyptian-American scholar Mamoun Fandy put it, for many Islamist radicals, the act of terrorism becomes an act of worship. It is carried out according to a different calculus than that under which left-wing terrorists in previous decades operated.

1 Opinions, conclusions, and recommendations expressed or implied within are those of the author and do not necessarily reflect the views of the Department of Defense or any other agency of the Federal Government.

- In any case, even the best defenses can't provide a guarantee against terrorist successes. In the past, the damage from any single terrorist attack was usually small enough that governments could take the chance of occasional failures. That is no longer the case given the destructive potential of today's terrorists.
- Much of the traditional analysis on how to deal with terrorism says that one should focus on the grievances that terrorists exploit for popular support. If you can solve the underlying problem, support will dry up and terrorism itself will wither away. "Addressing root causes" is still necessary in dealing with 21st century terrorism, but there is still a lot of disagreement over what those root causes are, and, in any case, addressing them will take decades. We can't keep taking catastrophic losses while waiting for root causes to be addressed.
- In the past, countries have tended to fight terrorists using the tools of the criminal justice system. But 9/11 as well as other attacks by groups like Al Qaida demonstrate that this approach is inadequate.

In short, the present day terrorist challenge cannot be addressed by the usual means, especially by defensive means. It requires a combination of defense and offense. By offense, I do not mean only the use of military force. All capabilities must be brought to bear, and pacific means such as intelligence and police cooperation, improved financial controls, and the like are to be preferred when they can be effective.

Nevertheless, given the modern threat, there will be situations that arise when the use of force is necessary. Sometimes that will mean taking military action without the consent of the government of the country where the terrorists are located. There are several reasons why such cases may arise:

- The host nation may not have full control over parts of its own territory. This is the case today in Somalia, which for all practical purposes has no government, and also in remote areas of Yemen, Pakistan, and other countries.
- The host nation may be wittingly allowing terrorists sanctuary on its turf, perhaps in exchange for promises from terrorists to conduct their actual operations elsewhere.
- The host nation may be actively in league with terrorists or even sponsoring them as an element of its own national strategy.
- The threat may be so pressing or the intelligence about the terrorist presence so sensitive and perishable as not to admit the delays or risks of compromise that would be entailed in asking the host government for its agreement to joint action.

For all these reasons, it is a virtual certainty that the United States – and perhaps other countries – will use force against terrorists on foreign soil at some point. The question at hand is how that fact can be reconciled with the rules of international law?

Some may question why we should worry about what the rules of international law say on the subject. Won't *raison d'état* simply trump any formal rules that may get in the way of whatever the United States thinks it needs to do?

There are three reasons why we cannot dismiss so lightly the question of the international legal justification for such uses of force.

First, from the perspective of those who are committed to international law as a matter of principle, it is important to recognize that international law is credible only to the extent that it corresponds to actual state practice. Clinging to extreme theoretical interpretations of what one thinks the law ought to be, in the face of the inevitable reality that states are going to behave otherwise, risks making international law an irrelevant joke and losing whatever moderating effects it can have on how international relations are conducted. That is in no one's interest, except possibly the terrorists'.

Secondly, from the opposite perspective, even those who see international law simply as a tool for the pursuit of state interests must recognize that not everyone shares that view. The United States and others involved in the fight against terrorism need support from other governments in their efforts. Those other governments are more likely to provide such support if they are satisfied that the legal basis for prosecuting the war against terrorists is sound.

Finally, as President Bush has said many times, it is an essential element of the U.S. strategy against terrorism to build a global grassroots consensus that "all acts of terrorism are illegitimate, so that terrorism will be viewed in the same light as slavery, piracy, or genocide: behavior that no respectable government can condone or support and all must oppose." Building such a consensus, particularly in areas such as Europe where the public places a great emphasis on formal international legal norms, depends on our ability to articulate a compelling case that the way we are fighting the war is consistent with those norms.

I believe it is possible to articulate such a case derived from three classic concepts in international law:

- That of the *hostis humani generic* – the common enemy of humankind.
- The doctrine that possessing the rights of a sovereign state carries with it the responsibility of executing the duties of a sovereign state.
- The logic of the inherent right of self defense as it applies to the realities of dealing with 21st century terrorism.

As I examine each of these concepts, I should emphasize that I do so not from the perspective on an international lawyer – which I am not – but from that of the policy-maker. The issue is not to craft legal rules of procedure for argument in a court of law, but to define the limits and possibilities of practical state action in the real world. That is my objective here.

The Common Enemy of Humankind

The expression *hostis humani generis*, "the common enemy of humankind," was apparently coined by Cicero in the first century B.C. to describe the "pirate" states of the eastern Mediterranean with which Rome was almost constantly in a state of war. The legal implications that Cicero intended from his formulation are quite different than those it implies today, but the modern understanding of what it means to be *hostis humani generis* has been pretty firmly established since the eighteenth century. That was the period when the great English jurist Sir William Blackstone wrote that as a pirate "has renounced all the benefits of society and government, and has reduced himself afresh to the savage state of nature, by declaring war against all mankind ... all mankind must declare war against him ... by the rule of self-defence."

The general acceptance among European states that pirates were common enemies of humankind had ramifications not only for courtroom trials of accused pirates but for military action as well. Western navies, especially those of Great Britain and the United States, were deeply engaged in anti-pirate operations well into the nineteenth century, and the officers of both navies understood themselves to have not only a right but an obligation to take offensive action against pirates wherever on the high seas they found them. In fact, on a number of occasions, naval forces landed in other countries – including territory under the sovereignty of other European rulers – to clean out pirate sanctuaries.

The concept of "common enemy of humankind" was later applied by various governments or scholars to slave traders, war criminals, and torturers. The designation was not always as widely accepted as for pirates. But if we come forward to the 21st century and think about what the term means, we can see that it is a precise definition of terrorists even more than it was of pirates. In fact, without using the actual phrase *hostis humani generis*, the UN Security Council resolutions passed after 9/11 imply that that is how terrorists should be viewed:

- Resolution 1368, adopted the day after the attacks on New York and Washington, said that international terrorism is "a threat to international peace and security."
- Resolution 1377, passed two months later, went further: "acts of international terrorism constitute a challenge to all States and to all of humanity;" "acts of terrorism endanger innocent lives and the dignity and security of human beings everywhere, threaten the social and economic development of all States and undermine global stability and prosperity."

Moreover, the methods used by terrorists place them in utter defiance of the law of nations. While agreement on a definition of terrorism has been elusive, it is generally accepted that the intentional targeting of civilian noncombatants is the core characteristic of terrorist tactics. This practice, as well as the taking and killing of hostages and other key elements of terrorist practice are in flagrant defiance of both treaty and customary international law, as codified in a host of treaties – such as the Hague and Geneva Conventions – and contrary to the teachings of all major religions.

Finally, Al Qaida-style apocalyptic terrorism, which seeks to undermine any state that is not based on an idealized conception of the 7th century caliphate established by the companions of Muhammad, represents a direct challenge to the legitimacy of the international state system, just as the anarchist terrorists of the 19th century did, but with greater destructive effect.

From a purely legal perspective, defining terrorists as common enemies of humankind would create universal jurisdiction over them – all states could act juridically against all terrorists, not just those who harmed their own citizens.

This concept of universal jurisdiction is commonly seen as something new, but it dates back at least to the time of Hugo Grotius, known as the father of international law, who wrote:

> It must also be known that kings, and any who have rights equal to the rights of kings, may demand that punishment be imposed not only for wrongs committed against them or their subjects, but also for all such wrongs as do not specifically concern them, but violate in extreme form in relation to any persons, the law of nature or the law of nations.

This "universal principle" has previously been applied to piracy, slavery, genocide, and hijacking, and many contend it should also apply to egregious human rights violations. It seems apparent to me that terrorism should clearly be included.

Sovereign Rights, Sovereign Responsibilities

For my purposes here, however, I am less concerned about the grounds for prosecution of terrorists in a court of law than about how the use of military force to combat them can be justified.

This justification is implicit in the way that Blackstone described the implications of the concept of *hostis humani generis*: since common enemies have declared war "against all mankind, all mankind must declare war" against them. Note that Blackstone does not say all mankind – in other words, all governments – **may** declare war, but that they **must** declare war.

Although the concept is familiar to specialists, the idea that sovereign states have responsibilities as well as rights may sound odd to most people. Yet the principle of sovereign responsibilities is integral to the entire concept of statehood within the international system. For example, one of the criteria that have traditionally been used for deciding whether a political entity should be recognized as a sovereign state is whether it wields effective power in the territory under its jurisdiction. Actually maintaining control over the national territory is implicitly one of the responsibilities of a sovereign state.

As one of the classic textbooks on international law points out, a core responsibility of a sovereign state is that it is "under a duty to prevent and suppress such subversive activity against foreign governments as assumes the form of armed hostile expeditions or attempts to commit crimes against life or property." This would clearly seem to cover a duty to suppress terrorist groups operating on your soil.

But specific UN Security Council resolutions make this obligation even clearer. Resolution 1373, which I mentioned a few minutes ago, requires states to:

- suppress terrorist financial and recruiting activities
- block the supply of arms to them
- provide warning to other governments of possible terrorist attacks
- deny the provision of safe haven
- prevent the movement of terrorists between countries
- pursue criminal proceedings against them
- and above all to prevent the use of their territories for terrorism against other countries.

Obviously the best solution to the scourge of terrorism would be for all states to live up to these responsibilities. But, as we saw earlier, some states cannot, while others choose not to. What happens then?

Most scholarship on the international law of state responsibility talks about peaceful means of dealing with the non-fulfillment of obligations. For example, the "Draft Articles on State Responsibility" issued in 2001 by the United Nations' International Law Commission say that the offended state can respond only by suspending performance of some obligation it owes to the wrong-doer. But these articles were not drafted in the context of international terrorism. In fact, the word "terrorism" appears nowhere in them, even though they were published two months after the 9/11 attacks.

The fact is that the obligation to prevent the use of one's territory to attack one's neighbors is of a higher order than the obligation to honor European Union quotas on egg production. As Richard Haass, who was at the time the U.S. Department of State's Director of Policy Planning, said in a speech at Georgetown University last year, a state that can't fulfill such sovereign responsibilities as maintaining control over its territory "risks forfeiting its sovereign privileges including, in extreme cases, its immunity from armed intervention." A state that conducts armed intervention in such extreme cases, I would contend, is merely acting within the scope of its inherent right of self-defense.

The Inherent Right of Self Defense

Although the "inherent right of self-defense" is enshrined in Article 51 of the United Nations charter, it obviously precedes the charter both historically and conceptually. Article 51 does not grant this right; it merely guards it against impairment by the rest of the charter. The right of self-defense was specifically reiterated in connection with terrorism in Security Council Resolution 1373.

Of course, one of the long-standing issues in dealing with terrorism is this: who can an attacked state act against in self defense, and where? Customary international law provides a clear answer in the case of state-sponsored terrorism: "all acts of [administrative officials and military and naval forces] in the exercise of their official functions are prima facie acts of the State." This customary principle is echoed in the International Law Commission's draft articles I mentioned a moment ago.

In addition, again under customary law, the intentional or culpably negligent failure to prevent private groups – such as terrorists – from harming other states is also an act for which the host state bears responsibility.

It therefore seems clear that a victim of an armed attack by state-sponsored or state-tolerated terrorists has the right, under Article 51, to exercise force not only against the terrorist group itself but also against the state that sponsors or hosts the terrorist group, just as if that state's military forces had launched the armed attack. This was the basis for the United States-led action against the Taliban regime in Afghanistan.

I would go further, however. It seems logical, in light of the principle of sovereign responsibilities and especially given the clear language of the Security Council requiring member states of the United Nations to suppress terrorist activity, that an injured party also has the right to take military action on foreign soil if the host government is unable to prevent terrorists from conducting operations from its territory. There is ample historical precedent in the actual practice of states – which, it is important to remember, is one of the principal sources of international law. As I mentioned earlier, a significant portion of the wars on piracy in the 19th century took the form of destroying pirate bases and sanctuaries on foreign territory. It is well known that in the early 20th century the United States Army sent a sizable expedition into Mexico to pursue bandits that had been raiding farms and villages on the American side of the international border.

But one of the most interesting cases is less well known outside academic circles. In 1837, anti-British militants based in a remote area of New York State began conducting attacks across the Niagara River into British-ruled Canada. When the local American authorities failed to control the situation, British forces crossed the river, attacked the militant sanctuaries, and destroyed a boat, known as the *Caroline*, that had been used in the cross-border attacks.

Needless to say, the American authorities were not happy with this armed incursion into US territory by foreign troops, but the British government insisted that it had a right to act in self defense. What is interesting about this case – and what makes it especially relevant to the issue at hand – is that the American government ultimately accepted the British argument, at least in principle. In 1841, as part of a general resolution of a number of outstanding issues affecting U.S.-British relations, Secretary of State Daniel Webster acknowledged that, under certain circumstances, one country did indeed have the right to act in self defense on the territory of another – even if it was American territory that was involved.

Now, many – and perhaps most – scholars and lawyers contend that this kind of discussion of 19th century precedents is all very interesting but outdated, because resort to force to deal with this kind of situation is banned the United Nations Charter. A country that is threatened by armed bands coming from abroad must take its problem to the United Nations, it is argued. To act otherwise is to violate the pledge in Article 2 of the charter not to threaten or use force against other UN members.

For two reasons, I think this is a misreading of the charter.

First, what paragraph 4 of Article 2 actually says is that members renounce the "threat or use of force ... against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." What does that mean?

What it clearly does **not** mean is that every use of force other than self defense is against the territorial integrity or political independence of the state where the force is used, and therefore illegal. At least the states that comprise the international system don't understand it that way. For more than ten years, the United States, United Kingdom and France conducted regular overflights of Iraq – using force against Iraqi ground targets on occasion – in operations known variously as Provide Comfort, Southern Watch, and Northern Watch. For the first part of that period, the same three countries plus Turkey actually maintained military forces on the ground in northern Iraq, and Turkey continued to send sizable forces in pursuit of terrorists into the area throughout the decade. Even as they conducted these operations, all four countries repeatedly avowed their commitment to the territorial integrity of Iraq, and of the four only the United States asserted that the operations were authorized by UN Security Council resolutions.

If the United States was right, then collective action under a Security Council resolution would trump the prohibition on use of force in article 2(4). But if not, were France, the United Kingdom and Turkey being hypocritical in affirming Iraq's territorial integrity even as they carried out military operations in the territory of Iraq? No – they simply understood that the provision of the UN charter bars attempts to change borders or slice off chunks of another country's territory – or, as Iraq tried to do to Kuwait in 1990, to erase it from the map entirely – by force.

It does not necessarily rule out all other uses of force under all circumstances. It does not exclude the use of force to suppress terrorist bands that are not being suppressed by the state in which they are located. And it very definitely does not rule out the use of force by the United States against Al Qaida and its associated groups, who have already carried out armed attacks against not only the United States but against a variety of other countries, including Tanzania, Kenya, Indonesia, Turkey, Saudi Arabia, and Spain. Under any reasonable interpretation, these states have the individual and collective

right to defend themselves by force against the groups that attacked them and against those who shelter these groups.

There is a bigger principle at stake, however, and this goes to the central point I've been trying to make today. Robert Jackson, an American Supreme Court justice who was better known internationally as the lead U.S. prosecutor at the Nuremberg war crimes trials, once wrote that the United States Constitution "is not a suicide pact." What he meant, as he explained, was that doctrinaire logic must be tempered with practical wisdom; the right of free speech, for example, should not be used to justify the incitement of a riot.

The same logic applies to the United Nations Charter. It is not a suicide pact, either. When provisions of the Charter apparently conflict, or when one reading might promote conduct that is destructive of the purposes for which the organization was founded, we must interpret the charter by applying practical wisdom in a way that is consistent with the UN's underlying principles. Specifically, we must not interpret the provisions against the use of force or those governing the right of self defense in a way that protects and facilitates terrorism – something which at least three Security Council resolutions have declared to be contrary to the purposes of the United Nations.

The Way toward Consensus

It goes without saying that gaining international consensus on the interpretation of the law and the approach to dealing with terrorism that I have laid out here will be difficult. This is especially true given the existing understanding of the rules of the game. Resistance to the approach I am proposing will be especially strong among those who will see it as a formula for the reintroduction of Western imperialism – the countries that gained their independence, often at great cost, in the years since World War II.

Because of this skepticism, the obvious approach to developing an agreed international legal basis for the use of force against terrorists – namely the negotiation of a formal universal convention on the subject – would almost certainly be unworkable.

The alternative approach, which I think is the right way to proceed, is for those countries most affected by the terrorist threat to begin constructing a *de facto* body of customary international law on this issue through public pronouncements and action. This was how the international community dealt with piracy. Pirates were universally recognized as international outlaws centuries before any formal treaty declared them so. Indeed, by the time any general convention addressing the issue was ever adopted, action by different states all toward a common goal had largely eradicated the problem.

A similar process has taken place at initiative of various European governments in response to the humanitarian crises in the Balkans and Central Africa, through which a general right of humanitarian intervention is increasingly being recognized and accepted. There has been no formal treaty establishing this as a general right under international law. Instead, the continued assertion of such a right, followed by case-by-case exercise and acceptance of it, is progressively codifying it, to the extent that it is now accepted – at least tentatively – by organizations like the African Union, organizations that would ordinarily be expected to bitterly oppose all intervention.

There have already been a number of constructive steps on a parallel path with regard to terrorism. I have already mentioned the resolutions passed by the UN Security Council following 9/11. Equally important were the North Atlantic Treaty Organization's invocation of Article 5 of the North Atlantic Treaty, defining the strikes

on the World Trade Center and the Pentagon as "armed attacks" against the United States. The Organization of American States took similar action under the terms of the Rio Treaty. Both of these moves help establish the principle that a major terrorist event is appropriately understood as an "armed attack," which unequivocally puts military operations against terrorists within the context of legitimate self-defense.

In conclusion, I would emphasize that the unilateral use of force against terrorists in other countries is never the first option. Where a state is unable or unwilling to fulfill its sovereign responsibilities to suppress terrorism, the first choice is to strengthen its capabilities and its disposition to take action. When the use of force is required, it is preferable to act in concert with the host country – or at least with its permission. Even under conditions when a state has a right to take unilateral military action without the host's consent, exercising that right is not necessarily prudent in every case.

But there will be times when the preferred options will not be available. There will be times when the danger is sufficiently clear and present as to justify extreme countermeasures, situations in which the use of force meets the standards set forth by Secretary of State Daniel Webster in connection with the *Caroline* case I mentioned earlier:

> It will be for that Government [using force] to show a necessity of self-defence, instant, overwhelming, leaving no choice of means, and no moment for deliberation ... [and that its forces] did nothing unreasonable or excessive; since the act justified by the necessity of self-defence, must be limited by that necessity, and kept clearly within it.

In an era when terrorists such as Al Qaida have the intention and capability of inflicting mass civilian casualties, no government can remain idle if it has the means to prevent an attack on its people. It is important for the international community to recognize that governments are on a solid legal foundation when they do so.

The Development of International Cooperation in the Fight Against Terrorism

(Translated from the French)

Philippe Meunier

Deputy Director for Security Matters
French Ministry of Foreign Affairs

Ambassadors,
Ladies and Gentlemen,

To say that terrorism is the principal threat facing our world today is not to exaggerate. Its attacks are spectacular and lethal. Their human cost is all the more terrifying because they are indiscriminate. This is terrorism which attacks innocent civilians with the intention of causing maximum possible loss.

Fear spreads all the more effectively as the target widens. Terrorism now strikes on all continents, in Africa, America, Asia and Europe. The Muslim world in particular has been affected in all its centers, from Bali to Casablanca, and not forgetting Istanbul. Also targeted are institutions embodying values that should unite us all, such as the United Nations or the International Committee of the Red Cross.

Such terrorism, which aims to annihilate our form of social organization and our values, is totally unacceptable. For this reason there is no more urgent duty than to fight it: not only is this a moral imperative, but our collective security is also at stake. The challenge, given the very scale of the issues involved, must be confronted by the international community as a whole.

I. To halt the escalation of terrorism, an effort of analysis is indispensable. With the shock of September 11, despite the fact that it was heralded by other attacks, we entered a new era of terrorism. Its nature has radically changed.

The new terrorism is opportunistic, making use of all the possibilities offered by a now planetary world. It infiltrates its agents by exploiting porous national borders. It sets up its operations in zones outside the rule of law where the state has failed. Working alongside organized crime, it turns to its own advantage trafficking in arms, sensitive materials and drugs. It is expanding to a global level the vectors and channels whereby it is financed. It weaves its network on the worldwide web, where it disseminates its messages of hate. All these are areas in which terrorism exploits the fault lines in a universe where world governance is slow to form.

Global as it is in its objectives and its methods, terrorism also knows how to act locally. Its organization is networked. Its cells have no direct links with each other but know how to exploit local problems, how to latch on to local groups and draw on the pool of activists they offer. Terrorism operates and proliferates in areas under

threat, areas suffering from dictatorship and poverty, or from unresolved crises. It takes advantage of chaos to infiltrate. It exploits feelings of injustice and frustration.

In Al Qaeda, we are confronted with a terrorism that participates in no political process but strives purely and simply for destruction, despite the fact, I repeat, that it is skillful in exploiting local problems.

Although terrorism is certainly not synonymous with the Al Qaeda network alone, it is nevertheless a fact that it is developing particularly strongly in the radical Islamist camp. Its ambition is to provoke a clash of cultures and civilizations, forming a self-styled "World Islamic Front for Jihad against Jews and Crusaders," which it hopes will destabilize the democracies. With this in mind, its hope is that it can trigger a downward spiral of attack and reprisal that will become totally uncontrollable, a fatal trap set for us by the terrorist organizations. It also sets out to deepen the divide between rich and poor countries.

Because radical Islamists are the principal source of terrorist violence, we must extend the dialogue with the countries from which they come, work to settle the problems exploited by fanatics, help governments in their efforts to modernize society and to promote democratic principles.

II. Having taken on a strategic dimension, the challenge of terrorism calls for global reaction and cooperation. In its criminal reality, this scourge must be fought using all available means within the limits set by human rights and personal freedoms.

We must start with methods involving the judicial system, policing and intelligence, for terrorism calls essentially for the prevention and punishment of criminal activities. We must also develop methods to detect the financing networks and prevent the misuse by terrorists of funds intended for charitable and humanitarian purposes. All these are operations that demand partnership and close cooperation between all States. If we wish such cooperation to be fully effective, technical assistance must be provided to that end for the least wealthy nations.

Circumstances sometimes justify recourse to use of military means, as permitted by international law. This was so in the Talibans' Afghanistan, where terrorist groups were benefiting from manifest State complicity.

III. Two and a half years after September 11, much has been done to counter terrorism. The international legal arsenal, with twelve United Nations conventions, has received support from the Security Council. On this foundation, cooperation between States has been strikingly reinforced.

Immediately in September 2001, a Counter-Terrorism Committee was set up by the United Nations to assess the implementation by States of the measures laid down in Resolution 1373.

This Committee has recently been strengthened by the creation of a new executive body to be headed by a high-level public figure. Specially designated by the Secretary-General and assisted by experts, its director will conduct a dialogue with States on the application of Resolution 1373, which will also involve making visits in the field.

IV. The consolidation of international mobilization against terrorism is a priority of the G 8 Presidencies: France in 2003 and the United States in 2004.

The Evian Summit adopted last June an Action Plan to build political will and capacity to combat terrorism at the international level. To this end, the G 8 created a Counter-Terrorism Action Group.

While the body of law is now very comprehensive, there is a need to rally States that are still hesitating. We must ensure that all share the conviction that no compromise is possible with terrorism because no cause can ever justify the methods terrorism uses. Make no mistake about it, that primary objective has still not been attained in public opinion around the world.

It is in this spirit that France has intensified G 8 diplomatic activity in favor of universal adherence to the twelve UN Conventions relating to terrorism. Under its Presidency, it has made approaches to nearly 100 countries. Approximately forty States thus became party in 2003 to the International Convention for the Suppression of the Financing of Terrorism, which was launched on the initiative of France following the attacks of August 7, 1998 in Nairobi and Dar es Salaam. One hundred-twelve States are now parties to this convention, but the Middle East and South-East Asia are still lagging far behind in signing and ratifying it.

V. Over and above the strengthening of political will, it is necessary to improve the capacity to combat terrorism at an international level. This presupposes the development of technical assistance for the least wealthy countries, assistance that is still far from sufficient. Hence the need for closer coordination between the principal donors.

The Counter-Terrorism Action Group created last year at Evian is seeking to improve the effectiveness of the technical and training assistance provided to third countries, especially the developing nations, in order to enable them to meet their obligations under Resolution 1373 of the United Nations Security Council.

It has met on two occasions in Paris under French chairmanship, with the participation of the members of the G 8, Switzerland, Australia, Spain and the United Nations. Preceded by local coordination meetings in French Embassies in 70 countries, its work has made possible better identification of the assistance provided by the main donors and closer coordination in certain key geographical areas: South-East Asia; and on certain issues: the financing of terrorism. The sessions are to be held in Washington this year.

We are also taking into account the issue of the protection of critical infrastructures, that is to say those infrastructures that are indispensable to the life of any nation and the proper functioning of its State. These are in fact based today on communications networks whose interdependence crosses all national borders. In March 2003, France and the United States held a G 8 conference in Paris on vital information infrastructures, the first of its kind, laying the foundations for international cooperation in this new sphere. Experts are now acquiring the habit of working together on the basis of the eleven principles adopted by the G 8. It is essential to encourage the dissemination of the latter; we have begun to do so, including working through the United Nations.

VI. The European Union has not been inactive. Immediately after the attacks of September 11, 2001, it put the fight against terrorism at the top of its list of priorities. A plan of action was adopted at that time by the European Council, with reforms being set in train to ensure that the Union would address terrorist threats more effectively.

Exactly two and a half years on, the attacks in Madrid, whose scale was without precedent on the territory of the European Union, led the Heads of State and Government, meeting on 25 March, 2004, to adopt a Declaration on Combating Terrorism.

This text enshrines the political commitment to solidarity between the Member States in the spirit of the solidarity clause in the EU draft Constitution. In addition to very comprehensive measures for protection and prevention, it sets out a long-term

strategy for addressing all the factors underlying terrorism: feelings of frustration and injustice, regional conflicts, but also the vectors for financing, propaganda and the recruitment of terrorists. This is in my view a particular feature of the European approach that deserves to be saluted.

The political dialogue between the Union and third countries and its technical assistance will be mobilized in this direction. The newly-appointed anti-terrorism coordinator, Gijs de Vries, who will ensure that the European Union's action is coherent with regard to the fight against terrorism, will help intensify that action.

In order to combat more effectively the funding of terrorism, the European Council has asked the Member States and the Commission to step up their action, including that taken against informal vectors outside the scope of the banking system. This goes hand in hand with the inclusion of charitable organizations financing terrorist activities on the United Nations' and the European Union's lists of terrorist individuals and entities. However, much remains to be done on this issue.

France, which is to take up the FATF Presidency in July 2004, will redouble its efforts on these issues. Also in this area, in 2003 the G 8 adopted 29 principles for the traceability, freezing, seizure and confiscation of terrorist and criminal assets. Indeed, investigations in the banking field are a key component in the efficacy of the fight against organized crime and against the financing of terrorism. The 29 principles of the G 8 are intended to facilitate the search for and the identification of assets used to fund terrorism, notably through improved access to banking information, on the one hand, and, on the other, their temporary seizure and definitive confiscation.

Alongside this, it is important to counter the spread of ideologies preaching hatred and violence, whether on the Internet or in the mouths of apologists of terrorism.

The fight against terrorism should not be conducted solely in a spirit of urgency when violence explodes into the light of day, with its toll of innocent victims. It must also call on a broader vision of the real world, and a patient and determined healing effort, which must necessarily be conducted over the long term, along with a search for international consensus. Our global vision must comprehend the whole range of factors underlying terrorism and work in a sprit of partnership.

We must take initiatives that are both bilateral and multilateral to lead all countries to acknowledge the seriousness of these security issues, as was the case for the ministerial Conference on the drug routes from Afghanistan held by France in May 2003.

Lastly, it is necessary to develop technical assistance to encourage countries and to build up their capacity, for such assistance must go hand in hand with the normative action undertaken by the international community.

Back to the Future

David B. Rivkin, Jr.*

Unfortunately, violence, terrorism and war remain very much a feature of international life in the 21st century. Wars, in particular, continue to occur with distressing frequency. While conflicts in Iraq, Afghanistan and Palestine dominate the newspaper headlines, there have been dozens of less well-known wars in Africa, Asia, and Latin America. Are these just bouts of mayhem and destruction of varying lengths, or are there some normative and legal rules which govern even the realm of violence? To the extent that the normative rules apply – which is certainly my view and the one shared by most international lawyers and military professionals – are the wars of the 21st century subject to some new set of rules, or are the old rules, which have governed warfare for hundreds of years, still valid? At the risk of revealing my bottom line at the outset, let me say that the old rules are perfectly valid and proper, because the challenges and threats we face, while formidable, are not exactly new. The confusion that has arisen about the normative principles is attributable primarily to a lamentable case of amnesia, of people forgetting the old truths, rather than to some palpable deficiencies of the traditional rules. Hence, the working title of my presentation is "back to the future."

Now, there have always been rules in war, even if only to protect the dead. In the Iliad, for example, Homer recounts the gods' anger at Achilles desecration, by dragging Hector's corpse around the walls of Troy. Another oft-invoked purpose of these strictures has been to mitigate war's harshness, by bestowing certain protections on captured combatants, the wounded, the sick and individuals that are *hors de combat*. Even more fundamentally, laws of war played a crucial ethical function of legitimating an activity – the organized killing of human beings – which otherwise would have been considered both illegal and immoral. Thus, in the Western world, laws of war became inextricably intertwined with Judeo-Christian theology, with the just war theory being the end result of this fusion.

However, any purely humanitarian portrayal of the laws of war does not do them justice. Military efficiency and the need to ensure that the use of force is driven by *raison d'etat* also require that combat does not degenerate into indiscriminate violence. As a noted military historian, Martin Van Creveld observes:

> the first and foremost function [of the laws of war] is to protect the armed forces themselves… If armed conflict is to be carried out with any prospect of success, then it must involve the trained cooperation of many men working as a team. Men cannot cooperate, nor can organizations even exist, unless they subject themselves to a common code of behavior.

Today, a vast body of law has accrued, some rooted in custom and others in treaties, governing how wars are launched, fought and concluded. Until relatively recently, the content of this body of law has been developed and applied by sovereign states. The United States, of course, has a long and distinguished record of compliance with the laws and customs of war, having promulgated in the 1860s the world's first comprehensive military law manual – the so-called Lieber code – and takes far more care in the training and policing of its military forces that any other state, now or in the past. Lawyers

permeate the entire American military chain of command and legal input is sought for virtually every single military decision.

There are, however, troubles on the horizon. The United States continues to take a very traditional view of the laws of war, which have always been highly practical – allowing states to use force to protect their vital interests and seeking to ameliorate the suffering caused by war without actually interfering with a state's ability to prosecute it successfully. Today, the U.S. is fighting an elusive and ruthless foe, which proudly disclaims any intent to comply with the laws of war and attacks civilians. Meanwhile, America's European allies (along with a number of important humanitarian advocacy groups and international organizations), have been moving steadily towards a far more dogmatic understanding of the laws of war, clearly elevating humanitarian concerns over military necessity. For example, although for centuries the avoidance of civilian casualties has been an important aspect of the laws of war, the clear trend of European opinion makes it the primary consideration in any conflict.

European criticism of the U.S. actions in Guantanamo is also at odds with the traditional laws of war, which allow the detention of captured enemy combatants for the duration of hostilities. Many Europeans have also been hostile to the notion of a unilateral resort to force by the United States, no matter how compelling the circumstances, and are particularly opposed to the Bush Administration's announced anticipatory self-defense doctrine. Having the U.S. be assisted by an ad hoc "coalition of the willing" also does not satisfy critics. Rather, they claim that, absent some form of a multilateral sanction – ideally, by the Security Council, or at least by a regional organization – the U.S. cannot unleash the dogs of war.

Europe, of course, is not entitled to dictate the content or application of international law to the United States. However, when coupled with the deliberate efforts of humanitarian advocacy groups to undermine the U.S. position on the use of force, Europe's attitudes towards both the justification for, and conduct of, armed conflict impair the willingness of important allies, such as Britain, France and Germany, to assist the United States in the war on terror. At the very least, they adversely affect the political legitimacy of U.S. actions in the public eye. As such, they reinforce the misgivings about the use of force felt today in many segments of the American body polity and make the resort to force less likely.

Substantive *Jus in Bello* Changes

The traditional laws and customs of war – the so-called *jus in bello* – were supremely practical. Women and children are not to be targeted, wrote 18th century international law publicist Emmerich de Vattel, because they "are enemies who make no resistance, and consequently give us no right to treat their persons ill." However, he cautioned, "if women are desirous of being spared, they are to employ themselves in the occupations of their sex, and not to play the men in taking arms." Neither the purpose, nor the effect, of the traditional laws of war was to forbid the use of force, or to advantage the attacker or defender.

The result was a set of rules that were accepted as a positive good by all civilized states. They can be summarized as follows: (1) only sovereign states had the right to make war, and to vest their armed forces with the status of "lawful belligerents;" (2) the civilian populations of belligerent powers were not to be made the objects of deliberate

attack; (3) enemy belligerents can be attacked en masse or in a more discriminate fashion, with specific combatants being targeted; (4) quarter was to be granted when sought, and soldiers taken prisoner, or otherwise incapacitated by wounds, were to be treated humanely and accorded the respect and privileges due to honorable prisoners of war; (5) and certain weapons, which caused unnecessary suffering, were not to be employed. This code was tested to the breaking point, and beyond, by the 20th century's two world wars, but its general outline continued to be accepted, and individuals responsible for systematic violations of the "laws and customs of war" were tried and punished after the Second World War.

At that time, these rules, which had been the subject of various treaties and conventions over the previous fifty years, were codified in the four Geneva Conventions of August 12, 1949. Like the customary *jus in bello*, however, the Geneva Conventions did not seek to interfere with the ability of states to use armed force, or to prosecute an armed conflict successfully, and their application did not depend upon the justice of the cause(s) at issue. As the International Committee of the Red Cross explained in its commentaries on the Geneva Conventions, "the application of the Convention does not depend on the character of the conflict. Whether a war is "just" or "unjust", whether it is a war of aggression or of resistance to aggression, the protection and care due to the wounded and sick are in no way affected." The reasoning behind this approach is obvious – a humanitarian "law" that impeded either the right or ability of states, and particularly the Great Powers, to defend their vital interests would amount to little more than a series of pious, and unrealistic, assertions.

Unfortunately, beginning in the 1960s and 1970s, and initially culminating in the Protocol I Additional to the Geneva Conventions in 1977, this began to change. An odd alliance of human rights activists, supporters of, or participants in, "national liberation movements," and "Third World" governments (many the result of revolutionary or nationalist struggles), sought to re-strike the balance of traditional *jus in bello* norms. These efforts were directed at two areas in particular: the requirement that only states can sponsor "lawful" armed forces (obviously, of paramount concern to the Third World countries and insurgent movements), and the prohibition on deliberate attacks on the civilian population (of paramount interest to humanitarian groups). The resulting trends in both of these areas, after thirty years, have created new challenges for the United States now engaged in a war on "terror."

A. Private war.

Limiting the legal use of force to states was, in fact, one of the most important elements of traditional *jus in bello*. As Vattel wrote, "the sovereign power has alone the authority to make war." It was, of course, the centralization of that right in governments, rather than powerful aristocrats or self-sustaining private armies, that brought civil peace and order to Europe, marking the transition to the modern from the medieval world. This centralization also established the conditions for the establishment of regular, disciplined armies – forces capable of respecting the laws of war, and generally inclined to do so.

As a result, by the mid-19th century, private resort to armed force was forbidden, and armed groups that were not both regularly organized and sanctioned by a state, could be treated as criminals. To qualify as "lawful" combatants, all armed forces had to be sanctioned by a state, and were required to meet four additional conditions:

(1) to be subject to a recognizable command structure, (2) to wear uniforms, (3) to carry their arms openly, (4) and to conduct their operations in accordance with the laws and customs of war. Groups that did not meet these requirements, even if they were sanctioned by a state, were held to be "unlawful" or "unprivileged," and their individual members could be tried and punished – up to and including the death penalty.

After World War II, these rules were carried over into the Geneva Conventions, although at that time it was made clear that an armed force, otherwise meeting the requirements of lawful combatancy, could not be deprived of that status merely because one or more belligerents in a conflict did not formally recognize the government sanctioning the group.

When the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable to Armed Conflicts was convened by the Swiss Government (the depositary of the Geneva Conventions) in 1974, obtaining a more privileged status for guerilla groups was one, if not the primary goal of the developing world. To that end, in the final document – Protocol I Additional to the Geneva Conventions of 12 August 1949 ("Protocol I") – the conference obtained a relaxation of the rules requiring uniforms and that arms be carried openly, and a generalized (although highly debatable) claim that government sanction was no longer required for lawful belligerency. These provisions, however, made Protocol I unacceptable to the United States and we formally rejected it in 1987.

Unfortunately, all of Europe's military powers (including Britain, France and Germany) have ratified Protocol I and, to the extent that it does create rights for terrorists, they must comply. Perhaps the most damaging effect of Protocol I, however, has been the cover it gives to activists who claim that terrorists groups, such as al Qaeda, must – as a matter of customary international law – now be treated as honorable prisoners of war. This is incorrect, both because al Qaeda does not meet even the relaxed standards of Protocol I, and because the United States has noted its objection to these new rules, which therefore cannot be imposed on it.

Nevertheless, the persistent claims of misguided humanitarians clearly have made the task of detaining and debriefing captured members of al Qaeda and the Taliban far more difficult. Moreover, a number of European states, including Germany, France, and Denmark, as well as Canada, Kuwait and Australia, have asked that any of their citizens detained as unlawful combatants at Guantanamo Bay, be charged or released. Under the traditional laws of war under which the United States operates, combatants captured in war need not be charged or released until the conflict is over and peace has been restored.

While the European approach to the problem of unlawful combatancy presents practical problems, this is not the worst of it. It legitimizes the activities of unlawful combatants precisely at the time when these pose an unprecedented threat to civilized countries. To be sure, throughout human history, there have always been individuals who have been addicted to the thrill of violence and evidenced disdain for the civilization and its rules, including the rules of war. Homer captured this mentality in the following passage: "You talk of food? I have no taste for food – what I really crave is slaughter and blood and the choking groans of men." Delegitimization of unlawful combatants is an indispensable component of an overall struggle to defeat them. Hence, treating them as POWs would send exactly the wrong symbolic message.

B. Collateral Damage.

In addition to eroding the limitations on *who* can resort to armed force, recent developments have also affected *how* force is used. It has long been accepted that civilians cannot be deliberately targeted for attack. Military forces must, in planning an operation and selecting targets, distinguish between civilian and military objectives. This principle of "distinction" is universally accepted, and is fully endorsed by the United States. However, it also has long been accepted that the principle of distinction did not impose a zero civilian casualty requirement. As Spanish international law publicist Balthazar Ayala explained as early as the 1580s, although the "intentional killing of innocent persons, for example, women and children, is not allowable in war," if civilians are killed unintentionally "as when a town is assaulted with catapults and other engines of war, the case is different because such things are inevitable in war." In short, civilian casualties are permissible under the laws and customs of war, so long as they are the unintended consequence of an otherwise lawful attack and are proportional to the military objective being sought. Together, the principles of distinction and proportionality are designed to limit the amount of "collateral damage," and especially the number of civilian casualties, so far as possible in the context of an armed conflict.

Emphatically, however, they do not require that there be no civilian casualties, or damage to civilian objects. That, however, is precisely the rule that humanitarian activists have been promoting in recent years. For example, in its assessment of the April 2002 Israeli attack on Jenin, Amnesty International concluded that the Israeli Defense Forces had committed war crimes, including the "disproportionate use of force," because "more than half of the 54 Palestinians who died as a result of the inclusion between 3 and 17 April, appear not to have been involved in fighting." The death of more than two dozen innocent people is tragic, but to claim it constituted a "disproportionate" use of force reveals a peculiarly absolutist conception of the laws of war. Given the harsh realities of armed conflict, compliance with such a rule – amounting to a zero collateral damage doctrine – would be impossible, even for the United States using the most technologically advanced weapons in history.

A likely explanation for this problem is a fundamental shift in how warfare is viewed by humanitarian groups and by some of our European allies. To put it in a nutshell, they seem to view the use of military force by governments as being subject to the same laws and standards as ordinary policing functions.

In the U.S. war on terror, this is seen most obviously in the insistence that al Qaeda and Taliban detainees at Guantanomo Bay be treated as criminal defendants, rather than as prisoners, captured in war, who may be detained, without trial, until the war is well and truly won. In the Middle East conflict, it is seen in the harsh criticism of Israel's policy of "targeted killings." These attacks against Palestinian military leaders are entirely lawful under the laws and customs of war, which permit attacks on combatants both on and off the actual battlefield.

The proponents of this view mistake, or confuse, the rules applicable to domestic law enforcement – where an effort must be made to arrest criminal suspects so that they can be properly processed through the justice system – and the imperatives of war – where the goal is to eliminate the enemy's ability to resist. It fails to take account of the fact that, in the domestic law-enforcement context, the government has a monopoly on both the legal right to use force, and the means to do it most effectively. This simply is untrue in the context of armed conflict, and explains why the rules of war have traditionally been so radically different.

The Legitimate Use of Force: *Jus ad Bellum*

In addition to rules governing how war is fought, there have also always been rules governing when a state can legitimately resort to the use of armed force. Returning to Homer, the Mycenaean Spartan most likely sacked the city of Troy, in the 12th century B.C., because it was rich and vulnerable. By 800 B.C., however, Homer felt compelled to clean up the story with a justificatory act of Trojan perfidy, the kidnapping of a Greek queen by a Trojan prince. Thus, a proper casus belli was provided in *The Iliad* for what otherwise would have been an unacceptable act of aggression. The need for some legal justification for war has remained pretty much a constant ever since.

Although this *jus ad bellum* does not, in principle, affect the application or implementation of the laws of war – they are applicable to aggressors and victims, in just wars and unjust wars alike – there is little doubt that the justification for war will color how a state's compliance with *jus in bello* rules is perceived by the wider world. Here, again, there are major differences between the view of the Untied States, and that of its closest European allies.

At the beginning of the 17th century, Hugo Grotius noted that, although [t]he grounds of war are as numerous as those of suits at law… [t]hree justifiable causes for war are generally cited: defense, recovery of property, and punishment." There is little doubt that the casus belli cited by states over the next three-hundred fifty years fell into one or more of these categories and the potential for abuse is obvious. Only a hopelessly unimaginative statesman would have been unable to articulate some basis, in one or another category, for his belligerent aims, whatever they might be. The United Nations Charter sought to address this problematic fluidity, but its solution was far from a model of clarity or effectiveness. In joining the United Nations, member states accepted a general obligation to "settle their international disputes by peaceful means," and there is no doubt that the Charter was intended to impose new limits on the use of force. The precise scope of those limits, however, is unclear. The goal of at least some of the individuals involved in the negotiations leading up the United Nation's establishment in 1945 was to outlaw war, and to limit the right of self-defense, for all intents and purposes, so far as to require a state to absorb an aggressor's first strike.

Indeed, this appears to have been the position of Harold Stassen, who served on the American delegation and suggested that the right of self-defense was so crabbed that the United States could not attack an enemy fleet steaming towards the Jersey shore. Evidently, it was Stassen who insisted that the Charter's acknowledgement of the "inherent right of individual or collective self-defense" in Article 51 also include the language "if an armed attack occurs."

Whatever Governor Stassen's purpose, when the Charter is read as a whole, its limitations on the use of force are far less stringent. In particular, Article 2 actually forbids the threat or use of force only "against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." The use of military force that does not involve territorial expansion, or threaten a member state's independence, is not forbidden so long as it is not otherwise inconsistent with the U.N.'s purposes. This leaves a wide berth for such customary international law doctrines as "anticipatory self-defense."

Moreover, whatever the intent in 1945, the actual implementation of the Charter also suggests a broad scope for the use of force. As Professor Michael Glennon notes:

> The Charter's use-of-force rules have been widely and regularly disregarded. Since 1945, two-thirds of the members of the United Nations – 126 states out of 189 – have fought 291 interstate conflicts in which over 22 million people have been killed. In every one of those conflicts, at least one belligerent necessarily violated the Charter. In most of those conflicts, most of the belligerents claimed to act in self-defense. States' earlier intent, expressed in words, has been superseded by their later intent, expressed in deeds.

Unfortunately, in spite of the fifty years of practice (not to mention customary international law principles) that support the anticipatory, and even preemptive, use of armed force in certain circumstances, the view that only the Security Council can authorize a legitimate use of force has found increasing favor in Europe, among NGOs, at the U.N. and in many Third World countries. Nowhere, however, has this trend been more evident than in the debates over the use of military force against Saddam Hussein's Iraq. The European Union position was stated by Christopher Patten, as follows: "We must all respect the authority of the United Nations and of international law. The Security Council has charted the way forward in dealing with this intensely difficult problem and every nation should act within the framework of the decisions and resolutions issued by the UN." France's Jacques Chirac and Germany's Gerhard Schroeder were even more definitive, stating during the debates over yet another UN resolution on Iraq that U.N. authorization would be necessary to any U.S. action against Iraq.

Conclusion

Few would disagree that, more than a dozen years after the Cold War's end, the world remains dangerous place – in some respects, more so now than when the superpowers glared at each other across the Elbe. Although a nuclear Armageddon is far less likely today, the actual use of weapons of mass destruction (WMD) – nuclear, chemical, and biological – has become a very real and immediate threat. The principal danger is not that one state will attack another with these weapons (although there are some notable exceptions), but that non-state actors, such as al-Qaeda, who are by definition beyond deterrence, will obtain and use WMD. This is because modern technology has enabled private individuals, for the first time in centuries, to create military-style forces capable of projecting power across the globe. That, of course, is precisely what al Qaeda achieved on September 11; it projected power.

As a result, the United States is at war. How the U.S. wages this war will determine its outcome.

The good news is that the U.S. enjoys enormous military superiority. The bad news is that there is a concerted effort, coming from many sources – our allies, international organizations, NGOs, and Third World governments – to change the rules governing when and how the dogs of war are unleashed. This effort builds upon several decades of bad trends. Indeed, in the very real sense, the laws of war have themselves become a new battlefield – an example of asymmetrical warfare – on which our adversaries are busy changing the rules in ways that play to their strengths and undermine ours. So transformed, the laws of war become what one commentator has referred to as the "lawfare".

The *jus ad bellum* and *jus in bello* rules are now at the heart of American statecraft. They are too important to be left to the lawyers. Some might object that the legal stakes

are not really that high. After all, the U.S. swiftly routed the Taliban and effected the regime change in Iraq. The broader version of this argument is that we will do what needs to be done and that international law in general and the laws of war in particular can be safely ignored.

Nothing can be more untrue. There is compelling evidence to suggest that the evolving *jus in bello* norms are already adversely impacting the U.S. military as it is fighting against al Qaeda and Taliban. The best way to kill senior al Qaeda operatives would have been early in the Afghanistan campaign, when all or at least most of them could have been found in that country. Unfortunately, this did not happen. According to the *Washington Post*, the adoption by the American military of the excessively legalistic and rigid rules of engagement "prevented operators of the armed Predator drones from opening fire on terrorist targets at least 15 times." Significantly, instead of having *jus in bello* norms shaped by the evolving technological opportunities in ways that are beneficial to the United States, the new *jus in bello* norms actually rob us of the opportunities provided by the new technology. The very value of Predator drones, armed with missiles, is that they can enable us to destroy a time-sensitive target virtually instantaneously upon its detection; having to wait for an approval from some lawyer sitting hundreds of miles away adversely impacts this whole process.

But, the practical problems are not even the most important ones. Ethics and moral appeals are the key to the legitimacy of U.S. actions, as perceived by the U.S. public and world public opinion. The U.S., in all of its endeavors, domestic and foreign, is preoccupied with the rule of law. Unless we feel that what we are doing is just, the chances of us continuing to do so are slim to none. Already large segments of American public and elite opinion are opposed to any unilateral resort to force, while the vast majority of American ethicists and religious leaders condemn anticipatory self-defense as illegal and immoral. Meanwhile, many Americans are troubled whenever they see scenes of destruction wrought in war, especially if there are civilian victims.

Given the nature of this struggle, there is a particular acute need to win the hearts and minds of the neutrals and utterly defeat our enemies. Hence, restoring traditional laws of war can be a great asset of American statecraft. It is the key to the continued U.S. global success.

Yet, we have not been very effective in this debate. Unfortunately, the U.S., while asserting on a case-by-case basis, the right to use force unilaterally, has not challenged the new *jus ad bellum* rules. It has not argued forcefully that there is nothing illegitimate about a unilateral resort to force; it is inherent in the nature of the existing international system, in which there are no accountable democratic entities above a state level. The U.N., or any other international organization, offers no superior form of legitimacy or better legal sanction to use force than any individual member.

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Reflections on Terrorism, the Doctrine of the Catholic Church and an International Legality Appropriate for Our Times

Professor Giovanni Barberini

1. Today we are confronted with a phenomenon of ***indiscriminate, unpredictable violence, called terrorism***, which represents a challenge for the international community. The outbreak and spread of terrorism has taken on many different forms, and has changed the ***concept of national security***, whereby it is the duty of a State to defend and protect its citizens. At the same time, it has changed the ***concept of aggression***, as it is envisaged in international law. Today, it is no longer a question of an attack on the territorial integrity of a State or on its political independence, as stated in Article 2 of the United Nations Charter. Rather, there is an attempt to achieve political or social objectives by resorting to indiscriminate violence, above all against defenseless, civilian populations. The culture of death – to kill others and to kill oneself in order to kill others – is a terrifying thought.

It has been said that the objectives and manifestations of terrorism are ***invisible, unpredictable and widespread***. Consider the terrorist tactics employed on September 11th: the hijacking of airplanes and the use of suicide attackers as instruments of war, in open contempt of human lives and in the name of religion. Terrorist attacks and grave acts of violence are committed under the direction, or with the complacency or support of a State or by groups and factions that escape the control of government authorities. The international community has been under serious attack now for over 30 years.

The ***identification of the causes of terrorism***, which may be human, historical, political or economic, requires an assiduous, in-depth analysis. These causes, in particular those that produce serious or very serious injustice, must certainly be confronted and eliminated. Some have managed to resist for too long. In an effort to identify the causes, one must be careful not to engage in rhetoric: the causes should never be attributed to only one side and, nonetheless, they cannot justify generalized forms of indiscriminate violence. Naturally, there are facts and circumstances which may be deemed to be the cause of terrorist attacks, yet this is not necessarily always true.

I am deeply troubled by the various forms of terrorism, which make extensive use of the mass media, and which are novel contemporary phenomena. It is difficult to enforce some of the written and unwritten rules which underlie the very co-existence of the many peoples inhabiting the Earth; rules that were established in other times to regulate other phenomena, such as:

- ***the rule of law;***
- the so-called ***constitutional guarantees of freedom,*** envisaged in the legal systems of modern democratic States;
- ***tolerance;***

I declare that the opinions expressed herein are strictly personal and do not represent the views of any of the public or private institutions I am affiliated with in my capacity as a researcher, professor or consultant.

- the full claim to ***State sovereignty*** and the exclusion of any form of interference whatsoever in its domestic affairs;
- the practice of ***freedom of movement;***
- the central role of the human being, politically and socially, and the respect for human lives;
- ***the fulfillment in good faith of international law obligations.***

2. What about the attitude of the Catholic Church, of the Holy See, which acts as a sovereign entity in the international community, and its head, the Pope, who has recently dealt with this issue in a resolute manner?

In our day the Catholic Church:

- condemns terrorism for being ***cruel and rampant;***
- encourages everyone to combat it in ***a united way;***
- denounces the ***unwarranted and unsettling recrudescence of international terrorism;***
- calls for a ***return to stability and international order;***
- calls for a ***regulating capacity of international organizations, in particular the United Nations;***
- is in favor of ***strengthening its powers in decision-making and action-taking.***

The Catholic Church is hoping for a revitalization of the international institutions, and does not seem to allow for any of the extenuating circumstances for the phenomenon of terrorism that others, even here in Europe, have often suggested. The Catholic Church today, more than anyone else, seems to be the international entity advocating the role of the United Nations, albeit a ***revitalized role***.

The condemnation of terrorism in the teaching of the Catholic Church comes from a very important source: the second Vatican Council document, Paragraph 79 of the pastoral constitution, *Gaudium et Spes*, states that "***having recourse to terrorist actions is also considered a new method of war.***" That was in 1965. Subsequently, in 1992, the new *Catechism of the Catholic Church* stated that "***acts of terrorism which threaten, injure and kill indiscriminately are in stark contrast with the notion of justice and Christian love*** (Par. 2297). Kidnapping, hostage-taking and torture are equally condemned, as they enable the rule of terror and exert intolerable forms of pressure.

The Pope presently appears to have three preferred interlocutors, in his resolute stance against terrorism:

- the world of Christianity;
- governments, especially the most influential;
- the religious leaders of moderate Islam.

The current Pope's position on war also deserves some attention. In his leadership, ***John Paul II is entirely against war and seems to want to supersede the just war doctrine***. In his teaching, he has underscored "***the inhuman character of war***", and we must recall that the second Vatican Council had declared its absolute condemnation of total war. Nevertheless, the second Vatican Council said that the advances made in scientific weaponry, among other elements, force one to reconsider the concept of war in an entirely new spirit. Furthermore, the Council document points out that, "war, unfortunately, has not been eradicated from the human condition;" it is tied to the violence and the passions which hurt us all, an idea also discussed by Plato.

On the issue of war, and the rejection thereof as a means for dispute settlement, the present Pontiff can strongly influence not only Catholic, but world public opinion, as can some political forces in many countries. This is a novel element. Christian communities have been mobilized through bishops, priests, the religious and the leaders of Catholic organizations. It is as if the communities and organizations, which have fully identified with the idea voiced by the Pope, have been shocked out of a state of lethargy. In modern times, no other Pope had ever succeeded in bringing together Catholics and non-Catholics, now united in peace movements. John Paul II has identified an idea and a value capable of shaking world public opinion. One must bear in mind the scope of this phenomenon. However, is it in the interest of the Holy See to also admit potentially anarchical and destabilizing movements that do not openly condemn terrorism?

3. I believe one cannot and must not overemphasize the power and effectiveness of international law, of its legally binding rules, which are codified through the consensus and the commitments of States. Nor can one superficially lay the blame on the United Nations.
However, one must ponder several issues:

- The UN is an international legal entity, distinct from its member states, which ***does not express a political will as an organization***, and this is a problem. It expresses the political will of the so-called majority of States, i.e. the stronger ones. The UN was established on this basis.
- Particularly ***in the case of armed intervention***, albeit in the ways envisaged by the Statute, when a strategic area is involved, or when significant geopolitical and/or economic interests are at stake, the following questions must be raised:
  - Who decides when to intervene in one case and not another?
  - Who decides when armed intervention is inevitable, seeing that it is viewed as an extreme remedy, or as a means to avoid an aggression or violation of the sovereignty of a State or its vital interests?
  - ***Under which circumstances*** is armed intervention deemed unavoidable, thereby warranting the so-called right/obligation of humanitarian interference?
  - ***Which instruments and armaments*** may be used?
  - ***Who decides when to cease*** the intervention?

The experience gained from cases of UN intervention under Chapter VII of the Statute has been substantially positive (actions taken following a threat to peace, a violation of peace and following acts of aggression). There have been more than 50 peacekeeping and international policing interventions (which could raise the heretofore not debated issue of the financial burden for taxpayers). Yet, we remember how different the circumstances warranting military action were: Korea, Lebanon, Bosnia and, more generally, former Yugoslavia, Kosovo, Kuwait, Afghanistan, Iraq; but, what about Rwanda, the Iran-Iraq war, Sudan, Nagorno-Karabakh, and the ongoing war between Israel and the Palestinians with no UN intervention? Oftentimes the United Nations Organization and the international community have been called upon to decide whether or not to intervene. International relations are full of pragmatism and compromises.

At any rate, the actions envisaged in Chapter VII of the United Nations Statute are difficult to apply in cases of terrorism.

4. Today one surely needs to rethink ***the concept of just war***, as theorized by scholastic theology and international law, even in light of the types of armaments available. Is a war fought to combat terrorism to be considered a just war? Yet another question, which is extremely difficult to answer is: Is a war fought to prevent terrorist attacks a just war? There is also a problem that I would term the ***reciprocity of violence;***

- The *just* reaction to terrorism could run the risk of becoming a never-ending war, of which there are examples;
- A war undertaken, however *just*, could run the risk of committing acts of terrorism itself;
- In either case civilian populations are involved, and there is the inevitable use of scientific weaponry, which could arguably give rise to unjustifiable barbaric conduct.

One could say that war should be considered as the extreme and last resort for the resolution of a conflict or crisis, in which case it may be chosen. But, what is the cut-off point? And under what circumstances?

John Paul II has provided some very important guidelines (Message for Peace Day 2000):

- concrete initiatives must have clear-cut timetables and objectives;
- the initiatives must be carried out in full observance of international law;
- the initiatives must be led by a supra-national recognized authority;
- the initiatives must not be determined solely by the logic of weapons;
- there is a need to make the best use of the previsions contained in the UN Charter, and to further define effective instruments and modes of intervention within the framework of the international rule of law.

5. I will argue that ***written norms are powerless unless they are backed by the political will of the parties concerned***. There exists an entire arsenal of conventions and protocols. One cannot underestimate the fundamental problem of the degree of acceptance of the UN's operating decisions. Of course, we can dye the servicemen's berets blue, but what good would that do if we question or disavow the legitimacy of UN intervention, even if it is armed.

I personally believe the question of the ***political will of the States concerned*** is of paramount importance. ***I consider it to be an essential ethical component in today's international relations***. In any case, without a manifest political will, the law is ineffective.

Here are two opposite examples:

- ***The CSCE experience in the proclamation of human rights as an integrating element for a new system of international relations and the European security framework.*** I am referring to the 1975 Helsinki Final Act and the political effects produced by the Helsinki process, which had major consequences even from a human standpoint. Well before 1975, the international community had ratified legally binding instruments for the respect of human rights (the 1966 Pacts, for example). However, international public opinion was unaware that they even existed. The convergence of interests between the then existing two blocks (with due emphasis on the United States-Soviet Union agreements, the Berlin question, SALT negotiations, etc…) enabled the occurrence of previsions that had already

been written in international law. We realize that the Helsinki process was able to overcome times of crisis and the risks of a breakdown thanks to the political will of the most influential States.

- ***The conditions placed by many Islamic States*** (although signatory) ***on the Convention on the Rights of the Child*** (Syria, Indonesia, Tunisia, Jordan, Pakistan).
  The Convention is a legal agreement that cannot be wholly enforced in these States, because some of its provisions are considered to be in contrast with Islamic law and the Koran. The international community arguably can do nothing when faced with the manifest political will of a sovereign State.

The existence and the practice of terrorism require another consideration, i.e. the question of the genuine sharing of the underlying values of life in an international community. But, ***which values are truly shared?*** Can the international community, and the supreme Organization on its behalf, demand that some values considered to be fundamental be shared? Some values are the very foundation of the UN Charter. Thus, two assumptions may be made:

- either these values are genuinely shared and the Charter is enforced with effective sanctions against those who violate them; or
- they are not shared by some States even though they have signed the Charter.

6. The ethical groundwork for the international rule of law is declared as follows: ***the pre-eminence of the good of mankind and all human beings over everything else is the starting point and the fundamental criterion for the organization of the international community.***

There is a widespread belief that many of the provisions contained in the Statute of the United Nations Organization need to be rewritten, if we want to consider it the organization of all States and all peoples. I will disregard the proposals being made in reference to the policy-making bodies (namely Security Council membership, the cognizance of the General Assembly and the Council, the efficacious powers to be granted to the decision-making bodies). I will provide just two indications which I think are fundamental, drawn from the lessons learned in contemporary political history. The indications which I dare present are not to be taken as proposals; I could not possibly do that, nor would this be the appropriate forum. However, I do think these needs are worthy of consideration:

1) ***The importance of the international protection of rights and fundamental freedoms of individuals and groups, including national, ethnic and religious minorities.***

There are now two weak references to this question, which has become fundamental to life in the international community. They are the references contained in the Preamble and in Article 1.3, which are nonetheless valid and important. The need for genuine respect of rights and freedoms must be codified. It must be stated that the failure to respect rights and freedoms is a threat to peace, violates peace and, thus, requires a response. Essentially, this means an attenuation of the rigorous principle of State sovereignty and the obligation to refrain from interfering in the domestic affairs of a State, seeing that the respect of rights and freedoms of individuals is a legitimate and direct international interest. I am not unaware of the risks involved here, as a prevision thus codified would lessen the discretionary powers of the decision-making body. It would assume the form of an obligation.

2) ***The possibility of creating a regional security framework.*** This topic may sound provocative, however it is an option which must be examined, as it could well mean a possible role for regional organizations. On the one hand, we are forced to acknowledge that the UN is somewhat removed from the numerous crises that occur; and that it runs into considerable difficulties when it must take action, being the bureaucratic and complex and politically conditioned organization it is. On the other hand, we might acknowledge that the regional organizations possibly have better mediating skills and opportunities, can take prompt action and, therefore, have the capacity for prevention. I recall the proposals submitted by the European Union delegations at the Budapest CSCE/OSCE conference in 1994, which was called *CSCE/first*. According to the proposal, regional organizations were to be given a primary role in crisis management and dispute settlement, while the UN maintained final jurisdiction. This approach certainly entailed some risks. Yet, Article 52 of the UN Charter already envisaged the existence of regional organizations, where it states "*in order to deal with peace-keeping and international security matters that lend themselves to a regional solution…*" within the framework of the Charter, of course. So, it would be a question of developing this approach further and providing for some kind of participation in decision-making.

7. Experience draws our attention to the consequences of the post-war period, among which the difficulties and the complicated circumstances produced by the need or the objective, for instance, to establish a political system which respects the inviolable rights of all individuals. We call that a democratic system. The European concept of the democratic life of a society reveals the undeniable differences there are with other religious social concepts, such as Islam, which allows (or imposes) stoning, which denies the rights of children that modern international law intends to safeguard, which does not allow dissidence, which condemns conversion to another religion. These are only some of the situations which impact the exercise of civil and political rights.

Is there room, in the theocratic concept of Islam, for the philosophy of natural law and inviolable or natural rights of the individual, which is peculiar to the European culture and also extended to other "diverse" individuals? With which form of Islam may one entertain this kind of dialogue? It is a hard question to answer even because the Islamic world is fragmented and there are different attitudes toward modernity. It does not mean one must oblige Islam to espouse European social and political principles, yet there must be some common ground. The scenario we are faced with today is that of so-called Islamic fundamentalism and of moderate Islam.

In its dialogue and relationship with Islam the Catholic Church is a pioneer church. We recollect how difficult is was for Catholic communities to survive in certain Arab states, and the attacks and killings which took place in some Islamic states in Africa and Asia due to Islamic religious fanaticism. The Catholic Church pays a very high price. And the Catholic Church is pursuing a liberal policy aimed at avoiding the clash of civilizations, of which we all sense the risks and dangers.

In conclusion, one may argue that it is difficult to design a shared framework for peace if there is no agreement on the central role of the human being, in both social and political terms.